

October 18, 2021

VIA ELECTRONIC MAIL

Chair Dianne Martin and the NH Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301

RE: RESPONSE TO 2021-02 SUBCOMMITTEE RECOMMENDATION OF CHARGE 1

Dear Chair Martin and honorable members of the SEC:

We respectfully submit these comments in response to the Docket 2021-02 Subcommittee's ('Subcommittee') recommendation on its Charge 1. *See Subcommittee Recommendation on Charge 1, August 23, 2021*. Attached please find an unofficial transcript of the Subcommittee's deliberation from its August 18, 2021 public meeting. This transcript provides important context to the Subcommittee's final recommendation.

BACKGROUND

RSA 162-H:16 IV(c) requires the SEC to find that a site and facility will not have an unreasonable adverse effect on public health. In permitting the Antrim Wind facility ("Facility"), the SEC determined that the Facility would satisfy the public health finding so long as it complied with the noise standard set forth in its rules. *See Decision and Order Granting Application for Certificate of Site and Facility, March 17, 2017 at 153*.

Shortly after the Facility was placed in service (December 2019), noise complaints were filed with the Town of Antrim and the SEC administrator. Around that same time, a dispute arose over the correct application of the SEC rule for turbine noise limits. Antrim Wind Energy LLC ("AWE") maintained that a 1-hour compliance interval, often cited as "1-hour averaging," was appropriate. Members of the public argued that SEC rule Site 301.18(e)(6) requires a near-absolute, not-to-exceed standard using a much shorter compliance interval (0.125 seconds).

At its March 24, 2021 public meeting, the SEC unanimously supported Member Duprey's motion for a subcommittee to investigate and provide an "initial determination on how the Committee's administrative regulations should be interpreted." *See Site Evaluation Committee Meeting Minutes for March 25, 2021 at 4*. Ms. Duprey's motion aimed to resolve the ambiguity over the compliance interval. The motion became part of the Subcommittee's Charge 1.

The Subcommittee convened two meetings, on June 17, 2021 and August 18, 2021. After considering public comment, the Subcommittee voted 2-1 to recommend that the compliance interval be at least 5 minutes for steady sound sources and longer, as determined by the person conducting the sound test, for variable sound sources¹ *See Subcommittee Recommendation on Charge 1, August 23, 2021, paragraph 77*. The Subcommittee derived this approach from its interpretation of the ANSI S12.9 Part 3 Standard.

¹ Under ANSI S12.9 Part 3 §6.5(b)(1) a steady sound is one where the difference between the maximum sound pressure level and minimum sound pressure level when measured during the 5-min observed period is less than or equal to 3 dB. Measurements are to be taken at 0.1 second time-averaged (Leq).

The Subcommittee also added paragraph 78 which recommends the full SEC consider initiating a rulemaking proceeding on this matter.

ARGUMENT

It should be evident by now that the compliance interval is a key component of the SEC's regulatory sound standard that cannot be defined independent of the noise limits in Site 301.14(f)(2)(a). Accordingly, the compliance interval must be clearly established *together* with the SEC's turbine noise limits during the rulemaking process. Anything short of that would result in a rule that is ambiguous and unenforceable. Site 301.18(e)(6) ascribes a noise monitoring interval of 0.125 seconds. The undersigned, who participated in the rulemaking process, insist that this provision explicitly defines the fixed compliance interval. The Subcommittee argues that the rulemaking record shows an intent to craft rules consistent with the ANSI Standard and that the SEC should look to the ANSI Standard for the compliance interval. *See Id. at para 63.*

There are two principal flaws in the Subcommittee's position:

1) Reliance on the ANSI Standard is overstated and misplaced

There is substantial information in the SEC's administrative and regulatory record dating back to 2006 that speaks to the intent of the SEC when it adopted Rules 301.14(f)(2)(a) and 301.18. *See Lerner Letter Antrim Wind – Evolution of Sound Complaints Sept 21, 2021.* The Subcommittee highlights statements from the rulemaking record that clearly show an intent to establish an absolute (not averaged) standard.² The Subcommittee then indiscriminately dismisses these statements as "stray comments" that are not indicative of administrative intent. *See Id. at para 55, 56. Also See footnote 2.*

It is striking how indifferent the Subcommittee is of the SEC record except where the record advances its own argument for consistency with the ANSI Standard. *See Id. at para 49.* Yet, the Subcommittee found only two instances where the ANSI Standard is referenced in the rulemaking docket: first as it pertained to replacing the term 'ambient' with 'background,' and second in citing how far a microphone should be placed relative to reflective surfaces. *See Id. at para 64.* Neither of these instances were material to the final rule. In fact, the contribution of the ANSI Standard overall to the SEC rule is unimportant.

2) ANSI Standard does not define a compliance interval

Based on its reading of the ANSI Standard, the Subcommittee recommends a compliance interval that is open-ended and subject to the judgement of the individual(s) conducting the sound compliance test. This recommendation is problematic for two reasons: a) The ANSI Standard *does not* define or recommend a compliance interval for meeting regulatory noise limits; and b) the Subcommittee's recommendation creates ambiguity rather than resolving it.

We are very concerned that the Subcommittee has misread §§6.5-6.7 of the ANSI Standard in trying to arrive at its recommendation. The purpose of the ANSI Standard is to provide guidance for

² Para 56 states: "For example, the Rulemaking Subcommittee referred to the noise limits several times as a "maximum" or "not-to-exceed" standard. *See, e.g.,* Statement of Chairman Honigberg, April 15, 2015 Trans. at 26-27; Statements of Commissioner Scott and Attorney Weisner, Aug. 18, 2015 Trans. at 45-46; Statement of Attorney Weisner, Sept. 29, 2015 Trans. at 144-45 ("[T]his is setting an absolute standard not to be exceeded.")"

conducting short-term sound measurements with an observer present.³ The determination of a regulatory noise limit *and* required compliance interval is solely the responsibility of the governing body tasked with protecting public health, which in this case is the SEC.

The Subcommittee's recommendation for a compliance interval is open-ended because the ANSI Standard does not define a compliance interval. Further, a compliance interval that is open-ended effectively cedes compliance authority for a portion of the SEC's noise rule to AWE or other third-parties with no regulatory authority or obligation to protect public health. Under this interpretation, noise monitoring at the Facility, even if conducted at the same time and location, but by different professionals using different compliance intervals will produce different, *and potentially opposite findings of compliance*. There is no evidence in the SEC's regulatory history, administrative intent, or 2015 rulemaking record that supports such an imprecise outcome, especially with regard to public health.

SUBCOMMITTEE DELIBERATION

At the August 18, 2021 public meeting, both Mr. Eaton and Mr. Duclos expressed concern that the SEC rules did not define a compliance interval and that a compliance interval could not be determined from the evidence available to them. They also questioned whether the ANSI Standard, which is the foundation of the Subcommittee's recommendation, provided a compliance interval. *See Transcript of August 18, 2021 meeting at 3-5, 8*

The need for rulemaking weighed heavily on the Subcommittee members prompting the members to add paragraph 78 to their recommendation.

Mr. Duclos was clear in stating:

[T]here is a LAeq T issue. T is undeterminable by this committee and we recommend let it go to the full committee to identify or do a rule change. They're the only ones that can make rules. You know. The subcommittee cannot make a rule and we're not charged with making a rule. We're charged with figuring what the existing rule says, and I think that's undeterminable based on our deliberations and our public comments. *See Id. at 6*

Presiding Officer Evans did not disagree. He also appeared to retreat somewhat from the written recommendation in stating "I think it would be beneficial to provide at least our interpretation of what the ANSI Standard says to the full committee just because they're going to be trying to do the same thing and having an understanding of what our thought process is here would be helpful to them." *See Id. at 10*

CONCLUSION

Establishing a new noise standard or reinterpretation of an existing standard after a facility is operational is fundamentally unfair to all parties. The Subcommittee has identified an issue with the existing SEC rule, but its recommendation appears more contrived than legitimate. There are other reasonable alternatives for the SEC to consider in order to correct the situation at the Antrim Facility. We agree with

³ The full title of the ANSI S12.9 Part 3 standard is "Quantities and Procedures for Description and Measurement of Environmental Sound — Part 3: *Short-term Measurements with an Observer Present*."

the Subcommittee that a rulemaking proceeding is necessary to correct the situation with future applications.

As the SEC works to resolve this issue, we believe it is important for the members to understand AWE's role in how we arrived at this point.

It appears AWE's noise expert, Robert O'Neal, was aware since 2015 of a possible ambiguity in the SEC rules regarding the compliance interval. *See Docket 2021-02 Transcript of June 17, 2021 meeting at 60.* Despite this, Mr. O'Neal carefully omitted any reference to a compliance interval in his 2016 Sound Assessment Report for the Facility and from the entirety of his Docket 2015-02 testimony, both written and oral. Throughout the 2015-02 adjudicative proceeding, Mr. O'Neal asserted repeatedly, and without qualification, that the sound levels *would never exceed the 40 dBA noise limit.*⁴ Neither he, nor AWE requested guidance on how to apply the rule. Instead, it appears, they quietly applied their own, preferred interpretation of Site 301.14(f)(2)(a) using 1-hour averaging. In doing this, they created the current crisis before the SEC and placed New Hampshire residents in jeopardy of having to live with excessive turbine noise.

We hope these comments are helpful. We look forward to the opportunity to discuss our concerns with the SEC. To date, no hearing has been rescheduled on this critical matter. We respectfully ask that a more formal proceeding be initiated that will provide an opportunity all parties to be heard in a more thorough and comprehensive way. If you have any questions regarding these comments, please do not hesitate to contact either Lori Lerner or Lisa Linowes,

Sincerely,

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⁴ Sound Level Assessment Report – Antrim Wind Energy Project at 5 https://www.nhsec.nh.gov/projects/2015-02/application/documents/2015-02_2016-02-19_att09_updated_noise_rpt.pdf (Stating: “The worst-case sound levels will be less than 40 dBA at any residence.”)

ATTACHMENT

Partial transcript of the 2021-02 Subcommittee August 18, 2021
public meeting

2021-02-2021-08-18-subcommittee-meeting-recording-part-1.mp3

00:00:00 - 02:00:05

01:49:22 J EVANS

We had, we had talked about whether or not to you know if there were any additional questions of the subcommittee just in general of any speakers. Or and or allow the facility, you know, I guess. What was your thoughts on how to how to.

01:49:40 JM TURNER

The committee has, the subcommittee has any other questions they can ask it now to whoever they want to. That would be my suggestion to you, but the subcommittee can do, You can do however you want.

01:49:53 J EVANS

I don't. I don't have any other additional questions for anybody that I have thought up since asking the other questions. Do either of you?

01:50:07 J DUCLOS

No, I think it's covered with the individuals or collectively.

01:50:08 J EVANS

OK. All right, so the next kind of piece on the agenda would be our discussion on the draft recommendations. I'm not sure if

anybody else had anything to add. I mean we have all, kind of you know, obviously spent some time looking at these and whatnot and so I don't necessarily have anything else to add other than that I think we may want to consider providing the full SEC with a with an actual recommendation of the, if we do choose to go with these, with the recommendations that are the draft recommendation, I think we should consider adding what the compliance interval should be. I think if we were to just send it over as is, I know it's not necessarily directly indicated in our charge that we have to provide them with a recommendation of what the compliance interval will be, but I think if we send it over without one then, I think they would still struggle with 'OK, so what do we do with this from here?' We've spent quite a bit of time researching this and going through this, and I think it would, you know, in the interest of time and making things. Uhm, you know? Obviously there's been a lot of comments that this is taking a long time, and I think if we don't send it over with a compliance interval, then I think it's only going to slow things down at the subcommittee's end that they may need another subcommittee to figure out what that that compliance interval is, or whatnot.

So I think we should send it over with a compliance interval. That's my opinion. I don't know if anybody else has any additional thoughts.

01:51:50 T EATON

What does John Mark think?

01:52:25 JM TURNER

Well, I mean, this subcommittee certainly has the, you know, can send whatever recommendation you decide, you know to do, but I would think that you're constituted under a certain order to consider things under certain charges and you need to limit yourself to the charge. That would be my advice.

01:53:00 J DUCLOS

Hopefully you can get that deep sigh on the record. I've read what has been submitted and I've spent a fair amount of time on this and I reread our charge. The Charge does not request the recommendation. Our charge did not and cannot establish a rule. That can only be done by the full committee. And I think, on our recommendation #3, we're dangerously close to making a rule that we haven't been charged to do or have the authority to do, so I have a problem with that. For between, you know, the public that has to deal with the noise, and looking at a .125 LAeq. The rule does not say that. The facility, Antrim Wind, has been using a one-hour that they thought was reasonable. They talked 10-minutes and then I think Miss Linowes brought this up in her statement when she was not agreeing with our third recommendation is because the five minute, I guess is Accelerated standard to set of background noise where noise is

somewhat constant is my understanding. But I could spend some more time I think Looking at the ANSI standard before that and reading it myself and try to analyze that. It's not really, setting, as she points out, an LAeq T. And that T can be anything, right? It could be an hour or 10 minutes. It could be a year, whatever the case may be, and it's not up to this subcommittee to establish what that T is. Other than looking at the rule, the plain language of the rule, and anything else that we have at our disposal that seems to make sense for what that compliance standard should be, I just sit here and I say, well, I can't, I can't do that. I think that we set a standard it should be rulemaking. If we recommend a standard, it should also be done under the auspices of rulemaking because the public has a right to define a rule. And I don't think we're going to afford them the opportunity to do that. I also feel if we even make a recommendation, it's not going to be something that's going to be accepted by all. You know we're still going to get into the "tastes great less filling," right? The fact is, what comes to my mind is that the committee that issued the certificate of site and facility issued it on the basis of health and safety and a standard that could be met by the facility. Otherwise they would have denied the permit. I mean, that's where I stand. They said, why even bother trying to set a standard that's too stringent if they can't meet it. You'd say

"Don't build it, right? You don't meet the health and safety standards." But they allowed it to be built. So what that standard is, I can't tell you what it is. I don't know. They're the ones that made the rule. They're the ones that took the testimony. I think they're the ones that have to come up with a new rule to clarify what the compliance standard is. I mean, that's just one opinion on this committee. But that's pretty much my opinion. I would say on the third bullet that we have to seriously rewrite that and identify the problem but not make the recommendation.

<Discussion from Dr. Fred Ward>

01:57:31 T EATON

I have to agree very much with John. I have a hard time figuring out what the standards are also and to send that over with our recommendation would be tough for me.

01:57:50 J DUCLOS

They could turn around, obviously and charge us to do something if they want. Because, you know, seriously, we put a lot of time into this. But a lot more time, I think, would have to be put into setting a compliance recommendation, you know, and there's a lot of background data and information of how we got to that standard I think we'd have to be deliberating as well. Short of that I would be hard pressed, like Mr. Eaton, to make that third bullet recommendation.

01:58:25 J EVANS

So you want, would you prefer to strike that?

01:58:33 J DUCLOS

No, I would say that we reached the conclusion that there is a LAeq T issue. T is undeterminable by this committee and we recommend let it go to the full committee to identify or do a rule change. They're the only ones that can make rules. You know. The subcommittee cannot make a rule. And we're not charged with making a rule, we're charged with figuring what the existing rule says, and I think that's undeterminable based on our deliberations and our public comments, everything that I've come down to, at least in my mind.

01:59:29 J EVANS

OK. That makes sense. Do you have any questions John Mark?

01:59:36 JM TURNER

No, it's up to the subcommittee to decide how they want to proceed. You know, taking a motion about adopting certain parts of this, or not adopting certain parts of this, or maybe scheduling another public meeting to discuss how to handle this or ...But you need to make a decision about what you want to do because that was agenda and you don't, I mean, you don't have to. You can make a decision to postpone it and do something else.

<SUBCOMMITTEE ADJOURNS BRIEFLY TO CONFER WITH COUNSEL>

Audio file

[2021-02-2021-08-18-subcommittee-meeting-recording-part-2 1.mp3](#)

Transcript

00:00:10 J EVANS

All right, I apologize. That took a little bit longer, but we just needed to have a brief consultation with counsel just to figure out what we need to be doing and make sure that everything is correct. So I think what we would like to do now is kind of basically what we're considering is whether or not to adopt the committee's recommendation. Uh, I think an acknowledgement of the fact that there have been quite a bit of concerns over the noise and how disruptive it is and what not. I think it may not be the, it may be advisable to add into this recommendation a recommendation to the full SEC to consider a rulemaking adjustment which would, which could even involve, you know modification to the limits as they are, you know, addressing the time issue and whatnot. And so I don't know if anybody else has thoughts on what exactly how we want to make, if we want to make a change to these recommendations and what that would involve. That's my thought process at this point. I don't know if either the two of you have anything to add to that.

00:01:50 T EATON

Mr. Chair, I agree with what you just said and I will vote for these recommendations as long as that caveat is in there because of the testimony of Ms. Berwick. So it should go to the full committee with that caveat.

00:02:15 J EVANS

Do you have anything you would like to add John?

00:02:24 J DUCLOS

<Laughter> I'm postulating. Well, the committee is charged with determining what the rule says. And the plain language of the rule doesn't have a time standard set to it. I think that's pretty clear in my mind. There is a requirement that we follow ANSI standards. And I think we're making a leap that, since, in our charge for recommendation three for sound emissions shall be measured using LAEQ over a time period that's at least five minutes, I think that's a little bit of a leap for this committee. Seeing the full SEC change the ANSI standards once they deliberate on it. And I'm somewhat perplexed between moving forward with some standard, you know, of recommendation from this subcommittee as a compliance standard that we've recommended for the full committee to approve, deliberate on, or change the rule versus giving them no recommendation whatsoever

and not having a compliance standard that could be enforced at some point, in the interim before another rulemaking to establish a clear and present time period would be established. So that's kind of where I am. Do I throw it back to the full committee and how long that would take? Or do we say our best recommendation is the five minute time period, because we could surmise that from an ANSI standard. I've been a regulator for 42 years in the hazardous waste program and I enforce rules and I write rules that are clearly written. That we know what they say and the public knows what they say and the facility knows what they say and we enforce those. It's hard to enforce a rule based on, to me, on a summation of what the ANSI standard would apply for a compliance period. I just find that unfair and unreasonable to all parties. And I would recommend that we don't make a recommendation on time period, but put it back to the full committee for Rulemaking, and also say that either they recharge us with another mission and force us to come up with a time period. And that's when I would feel comfortable with making a recommendation. Short of that, I'll vote for bullet one, bullet two and a change of bullet three to say that it's unclear as to what that time period is and would recommend that it be sent to the full committee for further consideration.

00:05:42 J EVANS

To be clear. The bullets you're talking about are on page 23 of the draft recommendation. It's the third bullet. Correct?

00:05:54 J DUCLOS

Yes, paragraph 77 Bullet 3.

00:06:03 T EATON

To me if we sent it on to the full committee with this recommendation, the full committee is going to take a good look at that and also hear testimony such as we've just heard, and they can make their decision as a full committee as to whether that should be taken out or not.

00:06:14 J EVANS

I think it would be beneficial to provide at least our interpretation of what the ANSI standard says to the full committee just because they're going to be trying to do the same thing and having an understanding of what our thought process is here would be helpful to them, I think anyway, so in my opinion, I would prefer to, I think it should be, we should include it as it is with that and then again add the caveat that they may want to consider a rule change.

00:06:56 T EATON

Again, how would that caveat be said again?

00:07:02 J EVANS

I think maybe we can work work work on the wordsmithing, of that, but I think it would basically say you know that may it may involve reconsidering not only the timeframe, but then possibly the standard, is it too high? Is it too high or too low or whatnot? Just that they need to, acknowledge that, you know, it would help acknowledge the fact that there are concerns, concerns of the public. Of the public and their health, either the health and safety or the, and I don't want to begin to interpret, you know some of the things that go into when they're doing the application for site and facility I, I think some of those you know, some of those determinations are made during that process as to what's you know what's considered a health risk versus just an annoyance or something like that?

00:08:04 T EATON

It would be up to the whole committee to possibly hire the expert to check the noises, if they wanted to.

00:08:17 J EVANS

I think that, well, that would be more of our, I think we're talking, you're talking the charge two more, right? I mean, we shouldn't, that we still have the subcommittee, still is tasked with doing that. We still have to investigate the noise

complaints, but I think without getting an indication of what the full SEC thinks and whether or not they agree with our recommendations or not, it's going to be very important for us to move forward with charges two and three.

Did you have any questions John Mark?

00:08:53 JM TURNER

No, except that you should proceed to a motion and gets you a second. You guys vote on what you want to recommend. Any changes you want to make and let's have a vote on it.

00:09:10 J EVANS

I guess I don't always want to be the one to do the first motion, but. I I'll, I'll do my best but I would like to motion to adopt this recommendation, but add in maybe say a fourth bullet to that page 23 that kind of also includes a recommendation to the to consider whether or not the full SEC feels it would be appropriate to do a rulemaking which would reconsider the noise levels, the time frame and whatnot just to provide complete clarity and hopefully get it such that it's addressed the needs of the facility as well as the public.

00:10:00 T EATON

I would second that

00:10:05 J EVANS

So, um, with that my vote would be yes on that motion.

00:10:15 J DUCLOS

John Duclos votes no.

00:10:17 T EATON

Tom Eaton vote yes.

00:10:20 J EVANS

So with that the motion is passed with a vote of two yeas and one nay.